Filed 7/7/09 The Community Redevelopment Agency of Los Angeles v. M&A Gabaee CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE COMMUNITY REDEVELOPMENT AGENCY OF THE CITY OF LOS ANGELES, Plaintiff and Respondent, v. M&A GABAEE et al., Defendants and Appellants.	B202796 (Los Angeles County Super. Ct. No. BC312251)

APPEAL from a judgment of the Superior Court of Los Angeles County, Helen I. Bendix, Judge. Affirmed.

R. Bruce Tepper for Defendants and Appellants.

Rockard J. Delgadillo, City Attorney, Claudia McGee Henry, Senior Assistant City Attorney, and Gerald M. Sato, Deputy City Attorney, for Plaintiff and Respondent.

INTRODUCTION

In this action for eminent domain, defendants M&A Gabaee (M&A), a California limited partnership, and Arman Gabay (Gabay), the general partner of M&A, appeal from the judgment of condemnation entered in favor of plaintiff, the Community Redevelopment Agency of the City of Los Angeles (CRA). We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Redevelopment Plan

On December 13, 1995, the City Council of the City of Los Angeles (City Council) passed Ordinance No. 170807, approving and adopting the Redevelopment Plan for the Council District Nine Corridors South of the Santa Monica Freeway Recovery Redevelopment Project (CD9 Redevelopment Plan). The project area is bounded by the Santa Monica Freeway to the north, Alameda Street to the east, 84th Street on the south and Normandie Avenue on the west.

Property At Issue

At issue in this condemnation action is 1040 East Slauson Avenue (the property). The property is located within the CD9 Redevelopment Plan project area, more specifically on the southwest corner of Slauson and Central Avenues in Los Angeles.

On July 30, 1998, Concerned Citizens of South Central Los Angeles (Concerned Citizens), a California nonprofit public benefit corporation, entered into an agreement to purchase the property from its then owner, Renato DaSilva (DaSilva). Concerned Citizens is one of the entities comprising Slauson Central, LLC, a Delaware limited liability corporation (Slauson Central), which as explained more fully below was ultimately selected by the CRA to construct the Slauson Central Shopping Center on a

site consisting of the property and two adjacent parcels owned by Stanley Kramer (Kramer).[1]

Owner Participation Rules

The CD9 Redevelopment Plan provided for "Participation by Property Owners . . ." as required by Health and Safety Code[2] sections 33339 and 33380.[3] Section 402.1 of the CD9 Redevelopment Plan authorized the CRA to promulgate rules for owner participation. The CRA adopted the owner participation rules (OPR) applicable to the project on October 5, 1995 via Resolution No. 5662, prior to the adoption of the redevelopment plan.[4]

Selection of a Developer for the Shopping Center

On June 3, 1999, the CRA mailed Statements of Interest and the OPR to DaSilva and Kramer. The CRA also mailed a Statement of Interest and the OPR to Concerned Citizens, which was in escrow to purchase the property from DaSilva. The Statement of

---

[1] The property was being used as a used car lot. The two other parcels were being used as an oil filter recycling facility and a scrap yard for metal. The entire site was contaminated with heavy metals.

[2] All further statutory references are to the Health and Safety Code unless otherwise noted.

[3] Section 33339 provides that "[e]very redevelopment plan shall provide for participation in the redevelopment of property in the project area by the owners of all or part of such property if the owners agree to participate in the redevelopment in conformity with the redevelopment plan adopted by the legislative body for the area."

Section 33380 provides that "[a]n agency shall permit owner participation in the redevelopment of property in the project area in conformity with the redevelopment plan adopted by the legislative body for the area."

[4] Section 33345 states: "With respect to each redevelopment project, each agency shall, within a reasonable time before its approval of the redevelopment plan adopt and make available for public inspection rules to implement the operation of owner participation in connection with the plan."

Interest referenced a proposal that Concerned Citizens apparently had submitted previously regarding the development of a community shopping center on the site.

DaSilva did not respond to the Statement of Interest, effectively forfeiting any owner participation rights afforded by the CD9 Redevelopment Plan.[5] Concerned Citizens, on the other hand, did return a Statement of Interest to the CRA on June 18, 1999.[6] Kramer also responded.

Thereafter, in November 1999, the CRA issued a Request for Proposals (RFP) outlining the proposed development of a neighborhood shopping center. Both Concerned Citizens and Kramer submitted proposals. Kramer's proposal did not meet the criteria delineated in the RFP. The proposal submitted by Concerned Citizens, however, met all the criteria and was overwhelmingly selected by an evaluation team. The team recommended that the CRA seek authorization to negotiate an Exclusive Negotiating Agreement (ENA) with Concerned Citizens.

The requisite authorization thereafter was obtained, and on January 4, 2001, the CRA entered into an ENA with Concerned Citizens and Regency Realty Group, Inc. The purpose of the ENA was "to establish procedures and standards for the negotiation by the Agency and the Developer . . . of a disposition and development agreement (a 'DDA') for development of the Project." The negotiating period under the ENA was 150 days unless extended.

Although authorized in June 2003, it was not until December 2003 that the CRA entered into a Disposition and Development Agreement (DDA) with Slauson Central as developer of the shopping center project. The DDA specified that "[t]he Developer is a

---

5 In a letter to the CRA dated January 21, 2000, DaSilva for the first time stated his intent to participate in the development of his property together with another individual. This apparently was too late.

6 In their opening brief, defendants represent that "Concerned Citizens was allowed to participate in the process solely because at the time of the solicitation [of statements of interest], it was in escrow to acquire the Property from Gabay's predecessor[, DaSilva]." This representation finds support in the record on appeal.

limited liability company composed of Concerned Citizens . . . , A California nonprofit public benefit corporation, and Regency Realty Group, Inc. a Florida corporation."

M&A Acquires the Property

At some unknown point in time, the real estate agreement between Concerned Citizens and DaSilva fell through. On March 26, 2001, after the CRA and Concerned Citizens entered into the ENA but before execution of the DDA by the CRA and Slauson Central, M&A entered into a real estate escrow and sales agreement with DaSilva for the purchase of the property. In January 2003, following a two-year escrow, M&A became the owner of the property. M&A subsequently entered into a ground lease with Kramer to lease Kramer's adjacent parcels for 25 years.

Thereafter, and at considerable expense, M&A undertook to redevelop the property in a manner consistent with zoning laws and the redevelopment plan for the project area. In contrast to Slauson Central, M&A required no government assistance to develop the property.

Eminent Domain Proceedings Commence in State Court

Defendants' efforts to redevelop the property were unsuccessful. On December 17, 2003, the CRA served M&A with a notice of intent to acquire the property, and on March 4, 2004, the CRA's Board of Commissioners adopted a Resolution of Necessity No. 6196 (RON) authorizing the CRA to acquire the property by eminent domain. On March 17, 2004, CRA commenced this eminent domain proceeding against defendants and others.

Federal Proceedings Instituted by Defendants

On April 22, 2004, in an effort to prevent the CRA from acquiring the property, defendants filed a complaint in federal court (*M&A Gabaee v. The Community Redevelopment Agency of the City of Los Angeles, et al.*, Case No. CV04-2798 SVW (MANx)), seeking declaratory and injunctive relief under the Fifth and Fourteenth

Amendments to the United States Constitution and section 1983 of Title 42 of the United States Code. The CRA moved to dismiss pursuant to Federal Rules of Civil Procedure, rule 12(b)(6), arguing that the relief defendants sought in federal court could be addressed in the state eminent domain action. The district court agreed that defendants could raise their Fifth Amendment challenge to the right to take in state court. The court therefore dismissed defendants' federal action for failure to state a claim upon which relief could be granted. (Fed. Rules Civ. Proc., rule 12(b)(6), 28 U.S.C., § 2072.) The Ninth Circuit Court of Appeals affirmed the order dismissing defendants' federal action. (*M&A Gabaee v. Community Redevelopment Agency* (9th Cir. 2005) 419 F.3d 1036, 1042.)

Resolution of Issues in State Eminent Domain Proceeding

Back in state court, the trial court held a trial on the CRA's right to take. Thereafter, the court issued a Statement of Decision in which it upheld the CRA's right to take the property from M&A.

Conditional Dismissal of Proceedings

During a right to take trial in an eminent domain action pertaining to another parcel in the redevelopment area, an error in the RON came to light. The trial court determined that the RON adopted by the CRA on March 4, 2004 did not find that "the public interest and necessity require the proposed project" as mandated by Code of Civil Procedure section 1245.230. The court noted, however, that the CRA "made a prima facie showing in its case in chief that [it] addressed the issue of project necessity and intended to make the required finding. The Board Memo which is attached to and incorporated into the Resolution correctly states the finding to be made. The transcript for the Resolution hearing shows that the issue of project necessity was discussed. It therefore appears that the incorrect language in the Resolution was a clerical error." The court thereafter issued a conditional order of dismissal, allowing CRA to adopt a corrected RON.

Entry of Judgment of Condemnation

After the conditional order of dismissal was entered, the CRA corrected the clerical error in the RON. The litigation thereafter continued with the CRA filing a second amended complaint reflecting the correction of the RON, defendant filing an answer, again asserting affirmative defenses under federal law, and the parties entering into a partial settlement agreement and stipulation re judgment in condemnation. Further proceedings were held and rulings made, culminating in the final judgment of condemnation from which defendants appeal.

DISCUSSION

Federal Taking Law

Defendants contend the trial court improperly ruled that the taking was for a "public use" under the Fifth Amendment, in that the finding of blight made by the CRA in 1995 when the CD9 Redevelopment Plan was adopted was stale. In defendants' view, in the absence of a current finding of blight, the property was not subject to condemnation under the federal constitution.

In *Boelts v. City of Lake Forest* (2005) 127 Cal.App.4th 116, the court observed that "[c]ertain federal authorities[7] could arguably be read for the proposition that the constitutional *public use* requirement means that there must be a current finding of *blight* anytime the eminent domain power is added to a redevelopment plan, because without a finding of blight, redevelopment, when it involves the power of eminent domain, devolves into nothing more than taking private property for a purely private use, i.e., simply taking it from one landowner and giving it to another." (*Id*. at p. 123, fn. 7.) In light of its finding, under the particular facts before it, that a new finding of blight was

---

7 See *Cottonwood Christian Center v. Cypress Redev. Ag.* (C.D.Cal. 2002) 218 F.Supp.2d 1203, 1228-1229; *99 Cents Only Stores v. Lancaster Redevelopment* (C.D.Cal. 2001) 237 F.Supp.2d 1123.)

required as a result of an amendment to the original redevelopment plan, the court in *Boelts* was "spared the necessity of addressing these federal authorities, or any arguable constitutional implications from the facts of the case before [it]."[8] (*Ibid*., italics omitted.) As we now explain, we, too, need not decide whether a current finding of blight is a prerequisite to taking real property under the federal constitution.

Before a public entity may commence an eminent domain proceeding, its governing body must adopt a "resolution of necessity." (Code Civ. Proc., §§ 1240.040, 1245.220.) The RON adopted by the CRA on March 4, 2004 (and later corrected), authorizing the condemnation of the property, expressly states that acquisition of the property "is for the following public purposes: *the elimination of blight* and redevelopment in connection with the construction of a shopping center project . . . on the Property . . . ." (Italics added.) This renewed finding of blight contained in the RON adopted by the CRA merely 13 days prior to instituting this condemnation proceeding unquestionably was current. Thus, the factual predicate of defendant's federal constitutional challenge—i.e., that the finding of blight was stale at the time the condemnation action was instituted—is faulty.

Many communities contain "blighted areas that constitute physical and economic liabilities, requiring redevelopment in the interest of the health, safety, and general welfare of the people of these communities and of the state." (§ 33030, subd. (a).) "A blighted area is one that contains both of the following: [¶] (1) an area that is predominantly urbanized, as that term is defined in Section 33320.1, and is an area in which the combination of conditions set forth in Section 33031 is so prevalent and so substantial that it causes a reduction of, or lack of, proper utilization of the area to such

---

[8] The court in *Boelts* clarified: "Our opinion should not, however, be read to establish an automatic rule to the effect that any time a power of eminent domain is added to a redevelopment plan, a new finding of blight is ipso facto 'warranted.' We need not, and do not, go that far in this decision. It is enough to say that under the facts *here*, a new blight finding was certainly 'warranted.'" (*Boelts v. City of Lake Forest, supra*, 127 Cal.App.4th at p. 123, fn. omitted.)

an extent that it constitutes a serious physical and economic burden on the community that cannot reasonably be expected to be reversed or alleviated by private enterprise or governmental action, or both, without redevelopment. [¶] (2) An area that is characterized by one or more conditions set forth in any paragraph of subdivision (a) of Section 33031 and one or more conditions set forth in any paragraph of subdivision (b) of Section 33031." (§ 33030, subd. (b).) A blighted area containing conditions set forth in section 33030, subdivision (b), "may also be characterized by the existence of inadequate public improvements or inadequate water or sewer utilities." (§ 33030, subd. (c).)

Subdivision (a) of section 33031 "describes physical conditions that cause blight:

"(1) Buildings in which it is unsafe or unhealthy for persons to live or work. These conditions may be caused by serious building code violations, serious dilapidation and deterioration caused by long-term neglect, construction that is vulnerable to serious damage from seismic or geologic hazards, and faulty or inadequate water or sewer utilities.

"(2) Conditions that prevent or substantially hinder the viable use or capacity of buildings or lots. These conditions may be caused by buildings of substandard, defective, or obsolete design or construction given the present general plan, zoning, or other development standards.

"(3) Adjacent or nearby incompatible land uses that prevent the development of those parcels or other portions of the project area.

"(4) The existence of subdivided lots that are in multiple ownership and whose physical development has been impaired by their irregular shapes and inadequate sizes, given present general plan and zoning standards and present market conditions."

Subdivision (b) of section 33031 "describes economic conditions that cause blight:

"(1) Depreciated or stagnant property values.

"(2) Impaired property values, due in significant part, to hazardous wastes on property where the agency may be eligible to use its authority as specified in Article 12.5 (commencing with Section 33459).

"(3) Abnormally high business vacancies, abnormally low lease rates, or an abnormally high number of abandoned buildings.

"(4) A serious lack of necessary commercial facilities that are normally found in neighborhoods, including grocery stores, drug stores, and banks and other lending institutions.

"(5) Serious residential overcrowding that has resulted in significant public health or safety problems. As used in this paragraph, 'overcrowding' means exceeding the standard referenced in Article 5 (commencing with Section 32) of Chapter 1 of Title 25 of the California Code of Regulations.

"(6) An excess of bars, liquor stores, or adult-oriented businesses that has resulted in significant public health, safety, or welfare problems.

"(7) A high crime rate that constitutes a serious threat to the public safety and welfare."

The RON incorporates the CD9 Redevelopment Plan by reference and makes it a part of the RON as though fully set forth therein. The CD9 Redevelopment Plan was approved and adopted by the City Council in 1995, via Ordinance No. 170807, after its consideration of a report that set forth, among other things, "a description of the physical and economic conditions existing in the Project Area causing blight."

In section 3 of Ordinance No. 170807, the City Council found and determined "based on substantial evidence in the record including, but not limited to, the Agency's Report to Council, and all documents referenced herein, and evidence and testimony received at the joint public hearing on adoption of the Redevelopment Plan commencing on December 5, 1995, that: [¶] a. The Project Area is a blighted area, the redevelopment of which is necessary to effectuate the public purposes declared in the California Community Redevelopment Law (Health and Safety Code Section 33000 et seq.). [¶] This finding is based upon, but not limited to, the following physical and economic conditions which characterize the Project Area (Report to City Council ('Report')): The existence of buildings, structures and properties in varying states of deterioration and dilapidation [citation]; The existence of buildings and structures with obsolete and

defective design or physical construction, including unreinforced masonry construction; deficient light and ventilation, constrained entry, lack of disabled access, lack of trash facilities, and incompatible uses which negatively impinge upon the economic use and/or development of adjacent and surrounding property [citation]; The existence of varying degrees of deterioration in regard to physical upkeep and maintenance of parcels, which include deferred maintenance parcels which appear to need minor treatment such as clean-up, de-weeding, minor repairs to fences, etc. and deteriorated parcels which appear to be in need of extensive improvement, have broken walkways or driveways, have deteriorated ground cover, or other attributes that need replacement [citation]; The existence of deficient parking [citation]; The existence of litter, debris and graffiti [citation]; The existence of buildings and structures of shifting uses [citation]; the existence of lots of irregular form, shape and inadequate size that are in multiple ownership which impact the economic feasibility of potential development [citation]; The existence of public improvement deficiencies and faulty and inadequate utilities, including substandard street, curb, sidewalk and gutter deficiencies, circulation deficiencies, inconvenient and inadequate access to and from parcels and deficient usable open space [citation]; The existence of depreciated and stagnant property values discouraging reinvestment [citation]; The existence of impaired investments including, declining property transfers at declining prices, declining building permit activity, and hazardous waste contamination [citation]; The existence of a high level of business vacancies and abnormally low rental and lease rates and a high number of vacant lots [citation]; The shortage or lack of necessary neighborhood-serving facilities, such as supermarkets, lending institutions, drug stores, etc., which affects the social and economic viability of an area [citation]; The existence of residential overcrowding [citation]; and The existence of high crime rates in and around the Project Area [citation]."

In our view, the renewed finding of blight contained in the CRA's RON effectively refers back to, and impliedly incorporates, the specific physical and economic factors found by the City Council in 1995 to constitute blight within the meaning of the

Community Redevelopment Law, specifically, section 33031. In light of this finding, and defendants' failure to cite to any evidence demonstrating the absence of blight, we are compelled to reject defendant's constitutional challenge. (*County of San Mateo v. Bartole* (1960) 184 Cal.App.2d 422, 432 ["The actions of public bodies, acting within the powers vested in them, are presumed to be proper."]; see also Evid. Code, § 664 ["It is presumed that official duty has been regularly performed. . . ."].)

Moreover, counsel for M&A, the property owner, appeared before the CRA on March 4, 2004 at the public hearing regarding the RON to initiate condemnation proceedings to acquire 1040 East Slauson Avenue. Counsel advocated for M&A, urging the CRA to permit it to develop the property. With regard to the proposed taking, counsel argued that if the property owner was going to be compensated "for the *blighted* lot, he wants to build a shopping center, and has the ability and, in fact, is already in the process to do it." (Italics added.) Counsel, on behalf of M&A, argued further: "And the property is worth much more, as you know. That's why we're doing this. That's why we're changing it from it's [*sic*] current *blighted* use to a shopping center, because it's worth much more in that condition. There's no intension [*sic*] of this agency, and that's why the negotiations are at an impasse to compensate for that to compensate for the fact that it's not a blighted property. It's going to be a valuable piece of retail space."

Counsel therefore acknowledged that the property owner sought to develop the property because it was blighted. In valuing the property, the owner looked to the future to what the property would be worth once developed and the blight eliminated—i.e., that it would not be blighted if the owner were allowed to follow through with its own plans to develop a shopping center on the property. M&A's admission, through its counsel, that the property indeed was blighted is yet another reason rejection of defendants' federal constitutional taking claim is warranted.[9]

---

[9] We do not intend by anything we have stated to suggest that a current finding of blight at the time of condemnation is required by the federal constitution. We hold only that in light of the CRA's renewed finding of blight in the RON and the property owner's

Compliance with Owner Participation Rules

Next, defendants contend the CRA failed to comply with its own OPR. More specifically, defendants maintain that the CRA erroneously failed to provide them with the opportunity to participate in the CD9 Redevelopment Plan. We are not convinced.

Section 600 of the OPR sets forth the "PROCEDURES FOR PARTICIPATION BY PROPERTY OWNERS." Section 601, entitled "Notice and Statement of Interest" provides: "Before entering into any Participation Agreements, Disposition and Development Agreements, Exclusive Negotiation Agreements, or taking other action which may involve the acquisition of real property in the Project Area, the Agency shall first notify Owners of property which may be acquired and call upon them to submit a Property Owner's Statement of Interest in Participating in the Project Area ('Statement of Interest—Owner Participation') to indicate their interest in participating in the particular proposed development or in otherwise participating in the redevelopment of the Project Area. . . .

"The Agency shall deliver to each owner of real property which may be acquired a Statement of Interest—Owner Participation at least forty-five (45) days prior to initiating any of the actions requiring acquisition of real property. Statements of Interest—Owner Participation shall include information requested by the Agency and be in the form requested by the Agency. Any Owner may also submit a Statement of Interest—Owner Participation at any time before such notification.

"Any Owner interested in participating in the redevelopment of the Owner's property must submit a Statement of Interest—Owner Participation to the Agency within the deadline set by the Agency which will ordinarily be thirty (30) days from the date of mailing of the Statement of Interest—Owner Participation by the Agency. After the deadline for submitting Statements of Interest has passed, the Agency shall send out Requests for Proposals ('RFP') to all of the Owners who have submitted Statements of

---

admission at the hearing pertaining to the RON that the property indeed was blighted, we need not resolve the federal constitutional issue.

Interest. The Agency reserves the discretion to send RFPs to other parties, in the Project Area. The RFP shall specify a deadline for submittal of proposals and state that the Agency reserves the right, at its discretion, to extend the deadline for submittal of proposals or to reject all proposals. If only one Owner has submitted a Statement of Interest—Owner Participation, the Agency may enter into negotiations with that Owner regarding that Owner's proposal for development, send out RFPs, or reject all proposals."

Section 502 of the OPR, pertaining to "Conflicts Between Development Projects," gave the CRA "the right to select a proposal from among those available to it for approval or further negotiation, or to elect not to take further action at that time. Once the Agency has selected the Participant with whom it desires to negotiate or agree, the Agency shall have no continuing obligation to re-offer the redevelopment opportunity to any potential Participant not selected, including the Owner of the property proposed to be redeveloped, despite substantial changes to the proposed project." Section 502 further specified that "[t]he opportunity to participate under these Rules shall not be construed so as to constitute a right of first negotiation or a right of first refusal of any other proposal or agreement."

By the time defendants acquired the property in 2003, the redevelopment project had been in the works for a substantial length of time, and the CRA had complied with its OPR. On June 3, 1999, the CRA mailed Statements of Interest and the OPR to DaSilva, Kramer and Concerned Citizens, which was in escrow to purchase the property from DaSilva.

After the ENA was executed but before the DDA was reached, M&A acquired the property from DaSilva. Defendants seemingly assert that M&A's new status as the owner of the property required the CRA to start the owner participation process anew. Although section 601 of the OPR requires the CRA to send property owners a Statement of Interest to participate "[b]efore entering into any Participation Agreements, Disposition and Development Agreements, Exclusive Negotiation Agreements, or taking other action which may involve the acquisition of real property in the Project Area," it does not state that this procedure must be followed each time a parcel of property to be

redeveloped changes owners. Indeed, section 502 of the OPR expressly addresses the situation before us. It states that "[o]nce the Agency has selected the Participant with whom it desires to negotiate or agree, the Agency shall have no continuing obligation to re-offer the redevelopment opportunity to any potential Participant not selected, including the Owner of the property proposed to be redeveloped, despite substantial changes to the proposed project."

Thus, having entered into an ENA with Slauson Central, the CRA had no obligation to start the owner participation process anew simply because M&A purchased the property from DaSilva. Defendants cite no legal authority compelling a contrary conclusion.[10]

Propriety of Conditional Dismissal

Finally, defendants contend the CRA's failure to comply with Code of Civil Procedure section 1245.230, subdivision (c), was jurisdictional, depriving it of any basis on which to file the condemnation action, and, as such, the conditional dismissal was improper. We disagree.

As previously noted, adoption of an RON is a prerequisite to the commencement of an eminent domain proceeding. (Code Civ. Proc., §§ 1240.040, 1245.220.) An RON must contain a "declaration that the governing body of the public entity has found," among other things that "(1) The public interest and necessity require the proposed project." (Code Civ. Proc., § 1245.230, subd. (c); see also § 1240.030.)

Rather than finding that "the public interest and necessity require the proposed project" as required by Code of Civil Procedure section 1245.230, subdivision (c)(1), the RON adopted by the CRA, namely Resolution No. 6196, contained the finding that "[t]he

---

10 Defendants have waived their cursory assertion that DDA approval was void and improper for failure to comply with the public notice requirements of Health and Safety Code section 33433 due to their failure to support this assertion with references to the appellate record. (Cal. Rules of Court, rule 8.204(a)(1)(C); *Gotschall v. Daley* (2002) 96 Cal.App.4th 479, 481, fn. 1.)

public interest and necessity require the acquisition of the Property for the Project." The trial court therefore correctly determined that Resolution No. 6196 did not conform to the requirements of the statute.

Defendants argue that this nonconformity required outright dismissal of this eminent domain action. Defendants are wrong.

A person who has an interest in property described in a RON may obtain judicial review of the resolution's validity via a writ of mandate filed prior to commencement of an eminent domain proceeding or by objecting to the taking after an eminent domain proceeding is commenced. (Code Civ. Proc., § 1245.255, subd. (a)(1) & (2).) Nothing in section 1245.255 "precludes a public entity from rescinding a resolution of necessity and adopting a new resolution as to the same property subject, after the commencement of an eminent domain proceeding, to the same consequences as a conditional dismissal of the proceeding under Section 1260.120." (*Id.*, § 1245.255, subd. (c).)

All objections to the right to take property described in an eminent domain complaint are to be heard and determined by the court. (Code Civ. Proc., § 1260.120, subd. (a).) If the court determines that the plaintiff has the right to acquire the property by eminent domain, then it shall enter an order to that effect. (*Id.*, subd. (b).) In the event the court determines there is any property that the plaintiff has no right to take, "it shall order either of the following: [¶] (1) Immediate dismissal of the proceeding as to that property. [¶] (2) Conditional dismissal of the proceeding as to that property unless such corrective and remedial action as the court may prescribe has been taken within the period prescribed by the court in the order. An order made under this paragraph may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff's failure or omission which constituted the basis of the objection to the right to take." (*Id.*, subd. (c).)

The second paragraph of Code of Civil Procedure section 1260.120, subdivision (c) "is designed to ameliorate the all-or-nothing effect of paragraph (1). The

court is authorized in its discretion to dispose of an objection in a just and equitable manner. This authority does not permit the court to create a right to acquire where none exists, but it does authorize the court to grant leave to the plaintiff to amend pleadings or take other corrective action that is just in light of all of the circumstances of the case. The court may frame its order in whatever manner may be desirable, and subdivision (c) makes clear that the order may include the awarding of reasonable litigation expenses to the defendant. . . . For example, if the resolution of necessity was not properly adopted, the court may, where appropriate, order that such a resolution be properly adopted within such time as is specified by the court and that, if a proper resolution has not been adopted within the time specified, the proceeding is dismissed. The plaintiff is not required to comply with an order made under paragraph (2), but a failure to comply results in a dismissal of the proceeding as to that property which the court has determined the plaintiff lacks the right to acquire." (Cal. Law Revision Com. com., 19 West's Ann. Code Civ. Proc. (2007 ed.) foll. § 1260.120, pp. 625-626; accord, 11 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 30A:32, p. 63.) A conditional order of dismissal, therefore, was properly entered by the trial court.

The judgment is affirmed.[11]

JACKSON, J.

We concur:

PERLUSS, P. J. ZELON, J.

---

[11] Defendants' request for judicial notice filed on June 10, 2008 is denied.